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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 247

STATE OF TEXAS ex rel. J. M. FALKNER,
Banking Commissioner of Texas,
Petitioner,

v.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS and BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judg-

ment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on May 15, 1961.

CITATIONS TO OPINIONS BELOW

The findings of fact and conclusions of law and the judgment of the District Court (R. 458-466) are unreported and are printed in Appendix B hereto, *infra* pp. 16-24. The opinion of the Circuit Court of Appeals (R. 494-506) has not yet been officially reported and is printed in Appendix B hereto, *infra* pp. 25-37.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 15, 1961 (R. 507; p. 38, *infra).* Rehearing was denied on June 15, 1961. (R. 514; p. 39, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTION PRESENTED

Was the Secretary of the Treasury of the United States acting within the scope of his authority under the provisions of 12 U.S.C. §90 and §265 in authorizing national banks to maintain and operate places of business at which checks are cashed and deposits received other than at their main banking houses, which functions constitute the operation of "branch" banks as defined in 12 U.S.C. §36(f), which is prohibited by 12 U.S.C. §36(c), and Article XVI, Section 16, Constitution of Texas, and Article 342-903, Vernon's Texas Civil Statutes?

STATUTES INVOLVED

The statutory provisions involved are 12 U.S.C. §36(c) and (f), §90 and §265, Article XVI, Section 16, Constitution of Texas, and Article 342-903, Vernon's Texas Civil Statutes. They are printed in Appendix A, infra, pp. 11-15.

STATEMENT

Petitioner brought actions in the nature of quo warranto proceedings against respondents, National Bank of Commerce of San Antonio and Broadway National Bank of Alamo Heights, in the District Court of Travis County, Texas, to determine whether respondents were exercising powers not conferred upon them by law and which they were prohibited from exercising under the Constitution and laws of the State of Texas. (R. 2, 9). Respondents filed petitions for removal to the United States District Court for the Western District of Texas under the provisions of 28 U.S.C. §1441(b) and §1442(a)(1). (R. 15, 21). Petitioner filed motions to remand the suits to the State Court (R. 37, 40), which motions were overruled (R. 43, 44), and the District Court assumed jurisdiction and consolidated the suits for trial. (R. 45). The District Court made findings of fact and conclusions of law (R. 458-465), and entered judgment that petitioner take nothing by its suits. (R. 466). The Court below affirmed the orders of the District Court overruling the motions to remand, and a majority of the Court affirmed the judgment of the District Court, Judge Hutcheson dissenting.

(R. 507). Petitioner filed petition for rehearing (R. 508-511), which was denied June 15, 1961, Judge Hutcheson dissenting. (R. 514). Petitioner filed motion to stay the Court's judgment (R. 515), which was granted on June 30, 1961, for a period of 30 days. (R. 516; pp. 40-41; *infra).*

REASONS FOR GRANTING THE WRIT

(1) The majority of the Court of Appeals has decided an important state question which conflicts with the applicable laws of the United States and the State of Texas by holding that 12 U.S.C. §90 authorizes the Secretary of the Treasury to designate respondent national banking associations as agents of the Government to establish and maintain facilities operating as branch banks in the State of Texas contrary to Article XVI, Section 16, Constitution of Texas, and Article 342-903, Vernon's Texas Civil Statutes, the validity and enforcement of which has long been recognized by Congress in enacting 12 U.S.C. 36 (c)(f) in 1932 as held by Judge J. C. Hutcheson in his dissenting opinion. (R. 504-506, pp. 35-37, *infra).* The majority opinion and judgment of the Court of Appeals is also in conflict with the decisions of this Court in *Franklin National Bank v. New York,* 347 U.S. 373, l.c. 378; *First National Bank v. Missouri,* 263 U.S. 640, l.c. 659, 660.

The District Court found as a fact (R. 461; pp. 19-20, *infra*), that the operation of the facilities authorized by the Secretary of the Treasury under §90 includes the functions of paying and receiving

individual moneys belonging to and the property of members of the Armed Forces and certain civilians as differentiated from "public money." *Coudert v. United States*, 175 U.S. 178; *Branch v. United States*, 100 U.S. 673. As construed by the Treasury Department, the Secretary of the Treasury could also authorize the facilities to take applications for and make loans to individuals. (R. 116-117). It is manifest that these facilities are operating as branch banks as defined by the laws of Texas and 12 U.S.C. §36(f).

(2) The majority opinion and judgment of the Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court. As stated in the majority opinion (R. 498; p. 29, *infra*), this is a case of first impression holding that the Secretary of the Treasury has the authority under 12 U.S.C. §90 and §265 to authorize national banks as agents of the United States to operate branch banking facilities on military reservations of the United States under the power of the Government to provide for national defense, as well as to operate such facilities in buildings owned by agencies of the Government which do not function or operate as a part of the national defense system.[1] Since the establish-

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[1] In Veterans Administration installations (R. 430), Denver Federal Center in Colorado, Bureau of Census Building and National Institutes of Health in Maryland, and Washington National Airport in Virginia (R. 431). The two facilities operated in Veterans Administration Center, Temple, Texas, and the facilities operating in Denver Federal Center, Denver, Colorado, are located in

ment of branch banks is either wholly prohibited by or unauthorized under the Constitution and laws of fourteen states, and limited by the laws of sixteen states, the decision of the Court below vitally affects the enforcement of the regulatory powers and laws of more than one-half of the fifty sovereign states which were recognized by the Congress in enacting 12 U.S.C. §36(c) and (f) in 1952. Therefore, the departure by the majority of the Court of Appeals from accepted constitutional principles is of sufficient importance to call for the exercise of this Court's power of supervision.

(3) The holding in the majority opinion of the Court of Appeals that 12 U.S.C. §90 must stand alone without regard to 12 U.S.C. §36 because nothing in either §36 or §90 indicates that Congress intended any different result, is contrary to the history of the amendments proposed by the Treasury Department to 12 U.S.C. §36 in 1942 (R. 149-151, 434), and to 12 U.S.C. §90 in 1956 (R. 160-161, 441-445), and the holding that Congress had long been apprised of the fact that the construction by the Secretary of the Treasury that §90 and §265 enabled him to designate national banks to serve as agents of the Government to establish branch banking facilities on military reservations and that Congress, in failing to enact legislation expressly repudiating such practice or placing it in a definite legislative scheme, indicated that Congress gave tacit approval of such facilities, are

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States where the establishment of branch banks is prohibited by state Constitutions or laws.

contrary to the holding by the Court in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, l.c. 477, 478.

In addition, the holding by the majority of the Court of Appeals that since 1942 the Secretary of the Treasury has construed §90 and §265 as enabling him to designate national banks to serve as agents of the Government to perform the functions of branch banks on military reservations is contrary to the record as shown by statements of officials of the War and Treasury Departments in their request for the opinion of the Attorney General of the United States (R. 362-368) that the establishment under 12 U.S.C. §90 and §265 of branch banking facilities upon military reservations in states prohibiting the operation of branch banks was authorized under the First War Powers Act of 1941 in connection with the prosecution of the war, and therefore doubt existed as to whether such authority still existed after the cessation of hostilities (R. 367), and that since the continuation of such facilities under War Department authorization expired January 3, 1941, no provision existed for the establishment of such facilities (R. 363-364). The opinion of the Attorney General of the United States dated January 20, 1948 (R. 397-403), constituted the first official interpretation of the power and authority of the Secretary of the Treasury to designate national banks as agents of the Government to operate facilities on military reservations performing the functions of branch banks.

(4) The majority opinion of the Court of Appeals holding that since Army post exchanges are arms of the Government essential to the performance of Government functions *(Standard Oil Co. v. Johnson*, 316 U.S. 481, 485), there is not sufficient difference between the banking facilities operated by respondents and post exchanges to say that the Government may operate one and not the other, fails to recognize that the operation of post exchanges upon military reservations is not and cannot be prohibited by state laws, while the maintenance of facilities operating as branch banks by respondents as citizens of Texas (28 U.S.C. §1348), has been and is prohibited both by the laws of the United States and the Constitution and laws of Texas. The sole question of law decided by this Court in *Standard Oil Co. v. Johnson, supra*, was that since post exchanges are integral parts of the War Department under War Department regulations, and arms of the Government, they were immune from state taxation except where Congress had specifically consented thereto (49 Stat. 1519, 1521, amended 54 Stat. 1059, 1060-1061). Here, Congress has specifically upheld the right of the State of Texas to prohibit the operation by national banks as citizens of the State of Texas from establishing and operating places of business other than at their own main banking houses where checks are cashed and deposits received (12 U.S.C. §36(c)(f), As stated by Judge Hutcheson in his dissenting opinion, "the state of Texas is a sovereign state and . . . its laws bind federal officers and agents just as they do everybody else, unless they conflict

with overriding federal constitutional principle or law." In the instant case the laws of the State of Texas do not conflict with but, on the contrary, are expressly recognized and ratified by federal law. As a result, the majority decision of the Court of Appeals which is based upon the decision of this Court in *Standard Oil Co. v. Johnson*, *supra*, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Assistant Attorney General
of Texas

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CERTIFICATE OF SERVICE

I, C. K. Richards, certify that I am a member of the Bar of the Supreme Court of the United States and one of the attorneys of record for petitioner herein. I do further certify that copies of the foregoing petition for writ of certiorari have been forwarded by United States mail, postage pre-

paid, to the following named attorneys of record for respondents: Ireland Graves and Robert S. Hearon, Jr., Capital National Bank Building, Austin, Texas; J. W. Parker, Jr., Fort Worth National Bank Building, Fort Worth 2, Texas; and John J. Cox, National Bank of Commerce Building, San Antonio 5, Texas; and to William H. Orrick, Jr., Assistant Attorney General, Civil Division, Department of Justice, Washington 25, D. C., for the United States as *amicus curiae*.

C. K. Richards
Assistant Attorney General
of Texas

APPENDIX A

UNITED STATES STATUTES

12 U.S.C. §36.

Branch banks

"The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

. . .

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by law of the State on State banks. . . .

. . .

(e) No branch of any national banking association shall be established or moved from one location

to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office,, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent . . . R. S. §5155; Feb. 25, 1927, c. 191, §7, 44 Stat. 1228; June 16, 1933, c. 89, §23, 48 Stat. 189, 190; Aug. 23, 1935, c. 614, §305, 49 Stat. 708. As amended June 15, 1952, c. 753, §2(b), 66 Stat. 633.

12 U.S.C. §90

Depositaries of public moneys and financial agents of Government

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them. . . . R. S. §5153; Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, §3. 34 Stat. 1290; Dec. 23, 1913, c. 6. §27, 38 Stat. 274;

Aug. 4, 914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809.

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12 U.S.C. §265

Insured banks as depositaries of public money; duties, security; discrimination between banks prohibited; repeal of inconsistent laws

All insured banks designated for that purpose by the Secretary of the Treasury shall be depositaries of public money of the United States (including, without being limited to, revenues and funds of the United States, and any funds the deposit of which is subject to the control or regulation of the United States or any of its officers, agents, or employees, and Postal Savings funds), and the Secretary is authorized to deposit public money in such depositaries, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government as may be required of them. . . . June 11, 1942, c. 404, §10, 56 Stat. 356. As amended Sept. 3, 1954, c. 1263, §26, Stat. 1235.

TEXAS CONSTITUTION AND STATUTES

VERNON'S TEXAS CONSTITUTION
(Vol. 3, p. 170)

Art XVI, §16. Corporations with banking and discounting privileges.

Sec. 16. The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter.

No foreign corporation, other than the national banks of the United States shall be permitted to exercise banking or discounting privileges in this State. As amended Nov. 8, 1904; Aug. 23, 1937.

VERNON'S TEXAS CIVIL STATUTES
(Vol. IA, p. 510)

Art. 342-903. Branch Banking Prohibited

No state, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house. For purposes of this

Article, "banking house" means the building in whose offices the business of the bank is conducted and which is functionally one place of business, including office facilities whose nearest wall is located within five hundred (500) feet of the nearest wall of the central building and is physically connected to the central building by tunnel, passageway or hallway providing direct access between the central building and the connected office facility or by pneumatic tube or other similar carrier, . . . The entire banking house shall for all purposes under the law be considered one integral banking house. Acts 1943, 48th Leg., p. 164, ch. 97, subch. IX, art. 3; Acts 1957, 55th Leg., p. 448, ch. 220, §1. As amended Acts 1959, 46th Leg., p. 213, ch. 123, §1.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Since 1942 limited banking facilities have been operated at certain military installations in the United States by national banking associations and state banks, as agents of the Federal Government, pursuant to the directions of the Secretary of the Treasury. These facilities are frequently authorized to provide a range of banking services, including furnishing cash to and accepting deposits from miiltary finance officers, and cashing checks for and accepting deposits from officers, enlisted personnel, civilian employees, and dependents of the military service concerned, acting in their individual capacities. The determination of whether a particular military installation should have a banking facility and, if so, what services it should render, is made by the Secretary of the Treasury in cooperation with the military department concerned.

2. The bank chosen by the Secretary of the Treasury to operate the facility is designated (if it has not been previously) as a depositary and financial agent of the United States under 12 U.S.C. §90 (applicable to national banks) or 12 U.S.C. §265 (applicable to all banks insured by the Federal Deposit Insurance Corporation, which includes national banks) and as such is authorized to perform the particular services set forth in the letter of au-

thority. The necessity for the facility and the range of services performed is reviewed periodically by the Treasury, and the facility is terminated, or services curtailed or expanded, as the judgment of the Treasury dictates.

3. The quarters for the facility, utilities, guards and janitor service are furnished by the military post. The operating bank furnishes to the Treasury Department and to the Installation Commander under whose jurisdiction the banking facility exists detailed monthly reports showing income and expense items attributable to the facility. Usually the facilities are operated at a loss, and this loss is offset by a deposit of Treasury funds, the earning value of which is equal to the operating loss.

4. The Treasury Department, The Comptroller of the Currency, the War Department, the Department of Defense, and the Attorney General of the United States have, since 1942, construed 12 U.S.C. §90 and 12 U.S.C. §265 to authorize the Secretary of the Treasury to direct banks which have been designated as depositaries and financial agents of the United States to operate limited banking facilities. These administrative officials have also concluded that restrictions in the national banking laws dealing with commercial bank branches do not apply to such facilities. This construction of the Federal statutes, and the fact that banking facilities have been and are being operated and maintained, have been called to the attention of Congress on several occasions.

5. The defendant National Bank of Commerce of San Antonio was designated as a depositary and financial agent of the United States Government under 12 U.S.C. §265 on February 2, 1943, for the purpose of operating a limited banking facility at the San Antonio Aviation Cadet Center (now known as Lackland Air Force Base) for the duration of the emergency and operated such a facility until it was closed on June 30, 1946, pursuant to the request of the Treasury. Since February 1, 1949, the defendant National Bank of Commerce of San Antonio, pursuant to its designation under 12 U.S.C. §265 as a depositary and financial agent of the United States and further specific authority from the Secretary of the Treasury, has operated a banking facility at Lackland Air Force Base, a military installation west of San Antonio, Texas. The defendant Broadway National Bank of Alamo Heights, Texas, was designated as a depositary and financial agent of the United States Government under 12 U.S.C. §265 on February 2, 1943, for the purpose of operating a limited banking facility at Randolph Field for the duration of the emergency and operated such a facility until it was closed on April 30, 1946, pursuant to the request of the Treasury, Since March 2, 1949, the defendant Broadway National Bank of Alamo Heights, pursuant to its designation under 12 U.S.C. §265 as a depositary and financial agent of the United States and further specific authority from the Secretary of the Treasury, has operated a banking facility at Randolph Air Force Base, a military installation northeast of San Antonio, Texas. The banking houses of each

of the defendants are a considerable distance from the military installations concerned.

6. Exclusive jurisdiction over the areas occupied by Lackland and Randolph Air Force Bases has been ceded by Texas to the United States.

7. The operation of the two defendant banks of the respective banking facilities is by them as depositaries and financial agents of the United States, and is entirely in accordance with the instructions and authorizations of the Treasury Department. No services are performed other than those authorized by the Secretary of the Treasury. In general, the following services have been so authorized:

(1) Paying and receiving banking facilities for officers, airmen, and civilian employees, including dependents of the Department of the Air Force acting in their individual capacity, and individuals and concerns employed by or attached to USAF installations.

(2) Paying and receiving banking service for custodians of non-appropriated funds acting in such capacity.

(3) Furnishing cash to finance officers of the Department of the Air Force (including payroll requirements when determined desirable).

(4) Accepting deposits from finance officers of the Department of the Air Force for credit to the account of the Treasurer of the United States.

(5) Selling savings bonds and stamps for cash.

(6) Payment of personal utility bills.

(7) Selling banking paper, such as cashier's checks, bank money orders, and traveler's checks.

8) Redemption of savings bonds.

These services are those listed in paragraph 40108, Air Force Manual 173-10, 12 November 1956, as the general services which a banking facility will normally be authorized to perform.

8. The services rendered by the banking facilities here involved are beneficial to the United States in that they, *inter alia*, aid in the proper handling of the official and semi-official funds, reduce absenteeism, and promote morale and personnel efficiency. The services rendered by the banking facilities here involved are deemed necessary by the Secretary of the Treasury and the Department of the Air Force.

9. The duty of maintaining a banking facility, such as those operated by the defendant banks, is a reasonable one within the meaning of 12 U.S.C. §90 and 12 U.S.C. §265.

10. The State of Texas, acting by its Attorney General at the behest of its Banking Commissioner, has objected to the operation of banking facilities by state or national banks in Texas on the ground that branch banking is not authorized in Texas to state banks, and the Federal law consequently de-

nies the power to maintain branches to national banks as well, asserting that banking facilities such as are here described are "branch banks."

11. Because of, and out of respect toward, the attitude of the Texas officials the Secretary of the Treasury has not authorized state banks in Texas to maintain banking facilities, although state banks are utilized in other states.

12. These actions in the nature of quo warranto proceedings were brought in the State Court seeking a declaration that the operation by the defendant national banks of "additional offices or places of business" (the banking facilities herein described) violated Section 16, Article XVI of the Constitution of Texas and Article 342-903, Vernon's Civil Statutes, and a permanent injunction against the operation of any office at which checks are cashed or deposits received other than at its banking house was also sought. They were removed to this Court on the theory that the petition disclosed a Federal question and because the actions are against the defendants as agencies of the United States for acts and services rendered as depositaries and financial agents of the United States.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter herein. This case was properly removed to this Court and removal jurisdiction exists under 28 U.S.C. §1441()b and §1442(a)(1).

2. The Secretary of the Treasury is authorized by 12 U.S.C. §90 and 12 U.S.C. §265 to employ depositaries of public money such as the two defendant banks as financial agents of the Government, and may require the defendant banks, as financial agents, to perform all such reasonable duties as may be required of them.

3. The designations by the Secretary of the Treasury of the defendant banks as depositaries and financial agents of the Government under 12 U.S.C. §265 are proper and in accordance with the statutes.

4. The duty of maintaining at Lackland Air Force Base or at Randolph Air Force Base a banking facility at which checks are cashed and deposits received and other financial functions performed, such as those set out in paragraph 40108, Air Force Manual 173-10, 12 November 1956, is a reasonable one within the meaning of 12 U.S.C. §265. Therefore, the Secretary of the Treasury has the authority to authorize and direct the defendant banks to operate banking facilities where the above functions are performed at each of the military installations concerned.

5. The use of such a banking facility need not be limited to those having custody of public moneys of the United States, but may also be extended to officers, enlisted personel, civilian employees, dependents, and others having an integral connection with the military installation concerned.

6. The determination by the Secretary of the Treasury (made in cooperation with the Department of the Air Force) that the banking facilities here involved are needed and that the services they are directed to perform are necessary and reasonable involves an exercise by the Secretary of the Treasury of an official function vested in him by law. Such authorized discretionary act on his part is not reviewable and may not be reviewed de novo, or otherwise, in a proceeding such as this.

7. The provisions of 12 U.S.C. §36 do not limit the authority of the Secretary of the Treasury under 12 U.S.C. §90 and 12 U.S.C. §265 to impose upon defendants the duties challenged by the plaintiff in this case which have been so imposed on them.

8. The Secretary of the Treasury is empowered by 12 U.S.C. §90 and 12 U.S.C. §265 to impose upon defendants the duties challenged herein by plaintiff. The action of the Secretary of the Treasury in imposing such duties falls within the legitimate scope of operation of those statutes.

Entered this 6th day of October, 1960.

s/ Ben H. Rice, Jr.

FINAL JUDGMENT

This action came on to be heard on April 25, 1960, on final trial on the merits, and the parties appeared by their attorneys and submitted to the Court without the intervention of a jury the matters in controversy, as well of fact as of law, and

the pleadings, the evidence, and the arguments of counsel, including briefs filed by the parties both before and after trial, having been heard and fully considered, it is the opinion of the Court that the law and the facts are with the defendants.

It is accordingly ORDERED, ADJUDGED, and DECREED that plaintiff take nothing by its suit, and that defendants go hence with their costs without day and that execution issue in their behalf for their said costs, to all of which the plaintiff in open court duly excepted.

Entered this 6th day of October, 1960.

s/ Ben H. Rice, Jr.

ENTERED: Civil Order Book, Vol. No. 9, Page 263.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18747

STATE OF TEXAS ex rel. J. M. Falkner,
Banking Commissioner of Texas,
Appellant,

versus

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS, and BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(May 15, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON and BROWN, Circuit Judges.

TUTTLE, Chief Judge: Appellant brought actions in the nature of quo warranto proceedings against

the appellees, the National Bank of Commerce of San Antonio and the Broadway National Bank of Alamo Heights, in the District Court of Travis County, Texas, by which actions it sought to determine whether the appellees were exercising powers not conferred upon them by their charters and allegedly prohibited by the Constitution and laws of the State of Texas. The appellees filed petitions for removal to the United States District Court for the Western District of Texas, claiming their right to do so under 28 U.S.C.A. §§1441(b) and 1442(a)(1),[1] and that court assumed jurisdiction, overruling appellant's motions to remand the suits to the state court. The two suits were consolidated for trial.

Before proceeding to a recital of the facts which gave rise to the issues presented on this appeal, it will be convenient to dispose of the question as to

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[1] "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought." 28 U.S.C.A. §1441(b).

"A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title, or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C.A. §1442(a).

the jurisdiction of the District Court to hear this case. We think that the petitions for removal showed at the least a colorable claim that the appellees were acting under an officer of the United States and that the appellees were acting under color of law, as agents of the United States within the meaning of §1442(a)(1) *supra*. Accordingly, the District Court had jurisdiction to entertain this suit, and acted properly in overruling the motions to remand. See *DeBusk v. Harvin*, 212 F.2d 143 (5th Cir.).

For almost two decades, limited banking facilities have been operated at various military installations by national banking associations and by state banks; those facilities have been under the direction of the Secretary of the Treasury and are operated as agents of the federal government. They are designated as depositories and financial agents of the United States under 12 U.S.C.A. §90, if national banks, and under 12 U.S.C.A. §265, if banks insured by the Federal Deposit Insurance Corporation. Each bank so designated is authorized to perform only those functions enumerated in the letter granting it authority to act. As found by the District Court, "The necessity for the facility and the range of services performed is reviewed periodically by the Treasury, and the facility is terminated, or services curtailed or expanded, as the judgment of the Treasury dictates."

Each bank herein involved was designated a depository and financial agent of the United States on February 2, 1943, the National Bank of Commerce operating facilities at what is now Lackland Air

Force Base and the Broadway National Bank at what is now Randolph Air Force Base. The National Bank of Commerce facility was closed by the Secretary on June 30, 1946,and was reopened, pursuant to the same authority, §90, *supra*, on February 1, 1949; it has been continuously operated since that date. The Broadway National Bank facility was closed on April 30, 1946, but it was reopened, under the same section, on March 2, 1949, and has since remained open. Each facility is physically located within an area in which exclusive jurisdiction has been ceded by the State of Texas to the United States, and in each case the facility occupies quarters furnished by the military post, from which it also receives utilities, guards, and janitorial services. Each facility furnishes to the Treasury Department and to the base commander a detailed monthly report showing those income and expense items which properly may be attributed to the facility. The District Court found with respect to similar facilities in general that "Usually the facilities are operated at a loss, and this loss is offset by a deposit of Treasury funds, the earning value of which is equal to the operating loss."

As found by the District Court, the functions which the facilities in question perform are limited to:

> (1) Paying and receiving banking facilities for officers, airmen and civilian employees, including dependents of the Department of the Air Force acting in their individual capacity, and individuals and concerns employed by or attached to USAF installations.

(2) Paying and receiving banking service for custodians of non-appropriated funds acting in such capacity.

(3) Furnishing cash to finance officers of the Department of the Air Force (including payroll requirements when determined desirable).

(4) Accepting deposits from finance officers of the Department of the Air Force for credit to the account of the Treasurer of the United States.

(5) Selling savings bonds and stamps for cash.

(6) Paying of personal utility bills.

(7) Selling banking paper, such as cashier's checks, bank money orders, and travelers' checks.

(8) Redemption of savings bonds.

In what appears to be a case of first impression, the appellant contended in the District Court and contends here that the banking facilities now in question are operated in contravention of the Constitution of Texas, which does not allow branch banks.[2] In pursuance of this constitutional prohibition, the Texas Legislature has provided that:

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[2] The applicable provisions of the Constitution of Texas are as follows:

"The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of state supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

"No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be

> "No state, national or private bank shall engage in business in more than one place, maintain any branch office, or cash checks or receive deposits except in its own banking house." V.A.T.S. Art. 342-903.

On this appeal, therefore, the appellant argues that the prohibitions apply to the banking facilities here in question because of their connection with state banking institutions domiciled in and incorporated under the laws of Texas, regardless of the appellee's relationship to the Federal government. The appellees, and the Federal government by way of amicus curiae brief, claim that they are exempt, by virtue of their federal connection, from the operation of the Texas constitution and statute. They base their authority to act on §90 which provides:

> "All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they shall perform all such reasonable duties as depositaries of public money and financial agents of the Government, as may be required of them. * *"

In effect, the question for our consideration is largely one of the applicability *vel non* of 12 U.S.C.A. §36(c), which provides:

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authorized to engage in business at more than one place which shall be designated in its charter.

"No foreign corporation, other than the national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State." Article XVI, Section 16, Constitution of Texas. (Emphasis added.)

"A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition and subject to the restrictions as to location imposed by the law of the State on State banks. * * *"

The State of Texas thus bases its position on the *pari materia* argument that the provisions of §90 go only so far as is permitted by §36, i.e., that banking facilities authorized by §90 may, under §36, be opened only where state law permits them. The appellees and the government, on the other hand, urge that §90 is not in any way limited to §36.

Upon careful consideration of the statutory provisions thus placed before us, we are led to the conclusion that Section 90 must stand alone. We find nothing in either Section 36 or Section 90 to indicate that Congress intended any different result. It does in fact appear that the legislative history is such that it requires the construction of Section 90 as an independent statute.

Admittedly, the power of the Secretary to act as he has done in the instant case was initially based upon his construction of Section 90. Since 1942, the Secretary has construed that statute as enabling him to designate national banks, and in the case of Section 265, banks insured by the Federal Deposit Insurance Corporation, to serve as depositories and financial agents of the government on military installations. It is clear from the government's brief in this case that Congress has long been appraised of this construction, and the fact that Congress has failed to enact legislation specifically repudiating the practice or placing the practice in a definite legislative scheme is sufficient indication that Congress has given its tacit approval to such facilities. We mention this legislative history principally because it is treated so extensively by the parties rather than as a basis for our decision.

Conceding, as we must, that Congress has the power to determine the conditions under which national banking associations shall operate, the power of Congress to enact such legislation cannot seriously be questioned. The section before us gives the Secretary of the Treasury the power to employ as government financial agents any national banking association, and, having designated a banking association so to act, the Secretary may demand that it perform all such "reasonable duties" as may be required of it. Clearly this is what the Secretary has done in the present case. The requirement that these national banks open and maintain banking facilities on these military installations is a reasonable imposition of one of the duties which may be

required of them under Section 90. Nor does it appear that the Secretary, operating in behalf of the government, has exceeded the authority granted to him by Section 90 and approved, as construed by him, by the Congress.

We think that the view we take of this case squares with those decisions, covering almost a score of years, which uphold the power of the government to establish similar facilities on military bases, as a result of which it is well settled that the government may operate, or have operated, on these military establishments facilities which may have little or no direct relation to the base as a military installation and whose existence may be justified in large part solely on the basis of necessity or even of convenience. Thus in *Standard Oil Company v. Johnson*, 316 U.S. 481, at 485, the Supreme Court observed that "post exchanges * * * are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." Other facilities, generally for food service, have been held to be such integral parts of the governmental scheme as to become arms of the government, see, e.g., *Nimro v. Davis*, 204 F.2d 734 (D. C. Cir.), cert. den. 346 U.S. 901, *Aubrey v. United States*, 254 F.2d 770, *United States v. Forfari*, 268 F.2d 31.

While they quite obviously perform totally different functions there does not seem to us to be a

sufficient difference between the banking facilities and post exchanges for us to say that the government under its power to provide for the national defense may operate or cause to be operated one and not the other. Suffice it to say that the airfields are so located, necessarily away from places in which usual banking facilities would otherwise be available, that the Secretary could reasonably come to the conclusion that such facilties were necessary and reasonable adjuncts of the military installations. Having come to this conclusion and having exercised the power which had been delegated to him, it must follow that he had the right to authorize these national banking associations to act as government agencies and to require of them that they perform all those duties which might be reasonably imposed upon them.

We do not now hold that Article XVI, Section 16, of the Constitution of Texas or the statutes enacted in pursuance thereof are invalid. We merely hold that the law of Texas must in these circumstances give way slightly and only in the case of these banking facilities and others similar to them, for, once it is established that the government has the right so to contract with these corporate entities, then the state may not place limitations upon persons—corporate or real—so as to impair the free exercise of the power to contract. We do not think that by so holding we do any real violence to the law of Texas or to those objectives which it seeks to achieve by the statutory scheme before us.

We think also that our decision in this matter is consistent with that of the District Court for the Northern District of Texas in *United States v. Papworth*, 156 F.Supp, 842, aff'd on other grounds, 256 F.2d 125, cert. den. 358 U.S. 854, rehearing den. 358 U.S. 914, in which the defendant was indicted for robbing a similar banking facility located at the Carswell Air Force Base. He claimed that the indictment did not allege any offense under 18 U.S.C. §2113(a) because the facility was a branch bank prohibited by the Texas Constitution and Article 342-903, *supra*, and that since it had no valid existence as a branch bank he could not be charged with the federal offense of taking funds by force from a bank or banking institution. The trial court held the facility not to be a branch bank but an arm or agency of the federal government, and as such, a military banking facility which was a bank or banking institution within the meaning of 18 U.S.C. §371, and the motion was denied. That court commented that "Even if it were to be conceded, which it is not, that the operation of these facilities constitute a technical violation of state law, the enforcement of such law would handicap efforts to carry out the plans of the United States, and the state enactment must give way." 156 F.Supp. 845.

The judgment of the District Court is AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

While I concur in the opinion that the court below correctly held that it had jurisdiction to hear and

determine the case, I think the judgment against the State was wrong and I dissent from the opinion of the majority affirming it.

It seems clear to me that the district judge was wrong in his view that the state was not entitled to prevent what was going on here, action, in my opinion, which was clearly in violation of the state constitution and statutes.

With deference, the opinion of the majority, that the Secretary has the right, as he did here, to override state statutory constitutional provisions and the long standing recognition thereof by congress in its practices and its acts, completely emasculates 12 U.S.C.A., Sec. 36(c), which fully recognizes the validity and enforceability of state statutes of the kind in question here. It also disregards and nullifies the long history of the controversy over the establishment of branch banks and the attitude of congress toward that controversy, and, by what seems to be an operation bootstrap, seems to hold that the Secretary, by the invocation and use of 12 U.S.C.A., Sec. 90, which clearly authorizes the Secretary of the Treasury to designate national banking associations as depositories of public money and authorizes him no further, can evade and avoid the branch bank limitations imposed upon banks by the Texas constitution and statutes. In assuming, as it does, that the authority given the Secretary under Section 90, to establish depositories, impliedly nullifies and repeals Section 36(c), 12 U.S.C.A., the opinion refuses to face up to the realities of the case which the counsel for the State of Texas met when he correct-

ly answered the question, how the Secretary could exercise the authority granted in Section 90, without doing what he did here, saying: "He doesn't have to designate a branch bank, indeed, he has no authority to do so."

I have no real understanding of, or sympathy with the state prohibition against branch banks. I do know, though, that the State of Texas is a sovereign state and that its laws bind federal officers and agents just as they do everybody else, unless they conflict with some overriding federal constitutional principle or law. Here no one points to either a principle or a statute which overrides these Texas banking laws, and the law of Texas in the matter in question is sovereign and must be obeyed, no matter who in the federal government seeks to evade or defy it.

The judgment of the district judge was, in my opinion, not in accordance with our constitutional system. The opinion of the majority, in my opinion, is not in such accord. I, therefore, DISSENT from it.

(SEAL)

A true copy Test: EWARD W. WADSWORTH, Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans Louisana.

JUDGMENT

Extract from the Minutes of May 15, 1961

No. 18747

STATE OF TEXAS, ex rel, J. M. FALKNER, Banking Commissioner of Texas,

versus

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS, and BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, State of Texas, ex rel. J. M. Falkner, Banking Commissioner of Texas, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, Dissenting."

FILED

15th day of June, 1961

Edward W. Wadsworth

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 18,747

THE STATE OF TEXAS ex rel. J. M. FALKNER,
Banking Commissioner of Texas,
Appellant,

v.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS, and BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS,
Appellees.

Appeal from the United States District Court for the Western District of Texas

(June 15, 1961).

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, HUTCHESON and BROWN, Circuit Judges.

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED, Hutcheson, Circuit Judge, dissenting.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18,747

STATE OF TEXAS, ex rel., J. M. FALKNER,
Banking Commissioner of Texas,

Appellant,

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, TEXAS, and BROADWAY NATIONAL BANK OF ALAMO HEIGHTS, TEXAS,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposiion of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court

denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 30th day of June, 1961.

/s/ ELBERT P. TUTTLE
United States Circuit Judge.

ORDER STAYING MANDATE. FILED: June 30th, 1961.